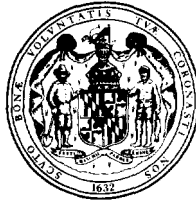


STATE OF MARYLAND

COMMISSIONERS

H. RUSSELL FRISBY, JR.
CHAIRMAN

CLAUDE M. LIGON
E. MASON HENDRICKSON
SUSANNE BROGAN
GERALD L. THORPE



BRYAN G. MOORHOUSE
GENERAL COUNSEL
DANIEL P. GAHAGAN
EXECUTIVE SECRETARY
GREGORY V. CARMEAN
EXECUTIVE DIRECTOR

PUBLIC SERVICE COMMISSION

WILLIAM DONALD SCHAEFER TOWER
6 ST. PAUL STREET
BALTIMORE, MARYLAND 21202-6806
(410) 767-8000
FAX NUMBER (410) 333-6495

January 9, 1997

VIA EXPRESS MAIL

The Honorable William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Reply Comments
CC Docket No. 96-45

Dear Mr. Caton:

Enclosed for filing is an original and 4 copies of the Reply Comments of the Maryland Public Service Commission. Thank you for your prompt attention to this matter.

Sincerely,

Susan Stevens Miller

Susan Stevens Miller
Assistant General Counsel

SSM:mc
Enclosures

cc: International Transcription Service
Suite 140
2100 M Street, N.W.
Washington, D.C. 20037

No. of Copies rec'd
List ABCDE

024

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED
FEB 10 1997
FCC - WASH DC

In the Matter of

FEDERAL-STATE JOINT BOARD ON
UNIVERSAL SERVICE

*
*
*
*
*

CC DOCKET NO. 96-45

REPLY COMMENTS OF
THE MARYLAND PUBLIC SERVICE COMMISSION

Bryan G. Moorhouse
General Counsel

Susan Stevens Miller
Assistant General Counsel

Maryland Public Service Commission
6 St. Paul Street
Baltimore, Maryland 21202
(410) 767-8039

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED
JAN 10 1997
FCC MAIL ROOM

In the Matter of
FEDERAL-STATE JOINT BOARD ON
UNIVERSAL SERVICE

*
*
*
*

CC DOCKET NO. 96-45

REPLY COMMENTS
OF THE
MARYLAND PUBLIC SERVICE COMMISSION

The Maryland Public Service Commission ("MDPSC") files these Reply Comments in response to the comments that were filed on December 19, 1996 in the above-captioned proceeding. This reply is limited to issues involving the high cost fund and the Federal Communications Commission's ("Commission" or "FCC") authority to utilize intrastate revenues to fund federal universal service.¹

**I. The FCC Does Not Need to Assume the Entire
Responsibility for Ensuring Universal Service**

Maryland's driving concern regarding the Joint Board's recommendations was set forth by Commissioner Chong:

Let us make no mistake about who will foot the bill for this universal service program. It is not the telecommunications carriers but the users of telecommunications services to whom these costs

¹ The MDPSC recently instituted its own universal service proceeding. (Case No. 8745). Thus, the MDPSC will be deliberating on many of the same issues raised in the federal proceeding. The MDPSC's response, therefore, is tempered by the existence of these ongoing proceedings.

will be passed through in a competitive marketplace.²

As a consequence, the MDPSC is very concerned about some specific elements of the Joint Board's proposal concerning the High Cost Fund which will have the effect of unduly burdening users of telecommunications services in Maryland. The MDPSC has labored extensively over the past several years to foster competition in Maryland. If the federal high cost fund is not structured appropriately, the subsidy collected will have the effect of distorting the telecommunications marketplace and thus hamper robust competition. Furthermore, an improperly designed high-cost fund will limit the MDPSC's options in creating the state universal service program intended to directly benefit Maryland telecommunications consumers. First, the MDPSC believes that the proposed high cost fund should be more narrowly directed to provide support to truly high cost areas. The MDPSC agrees in principle with various parties that the FCC's focus should be on providing for a predictable, explicit, and competitively neutral way of financing the federal high-cost fund at existing levels rather than on changing the size of the high cost fund.³ Furthermore, the MDPSC agrees with California that the Telecommunications Act of 1996 ("1996 Act") suggests modest,

² Separate Statement of FCC Commissioner Rachelle B. Chong, Concurring in Part, Dissenting in Part (Nov. 7, 1996) at page 14.

³ See, e.g., Comments of Bell Atlantic at pgs. 2-3.

targeted intervention in the market when necessary to promote universal service.⁴

As California explains, while the Act indicates that any universal service support shall be explicit, this does not mean that every alleged implicit subsidy should be replaced with a new "explicit" one of equal value. Since these subsidies ultimately will be recovered through rates, much the same way as they are today, very little will be gained in that exercise. The MDPSC also agrees with California that states are in a better position to more finely tune the definition of universal service to match the capabilities of the network and consumer demand.⁵ In addition, states are capable of coordinating rates and support. Thus, the FCC does not need to assume the entire responsibility for ensuring universal service.

The MDPSC believes that it is essential to have a high cost assistance program of the correct scope in order to ensure that consumers are not overburdened in funding the new program. The size and scope of the federal universal service fund is important because it will profoundly affect decisions regarding the size and scope of state universal service funds as provided for under Section 254(f) of the Act.

As the Senate Commerce Committee found, the 1996 Act neither requires nor contemplates that the Commission will adopt

⁴ See, Comments of the People of the State of California and the Public Utilities Commission of the State of California on the Recommended Decision at pg. 4.

⁵ The MDPSC has instituted a universal service proceeding and expects to schedule a prehearing conference in the near future.

a program which requires the level of high cost universal service support to become more expensive and burdensome to unsubsidized ratepayers than it is today.⁶ At this initial stage, the Commission's first priority should be to limit the size of the fund to the minimum necessary to comply with the universal service requirements contained in the Act.

II. The FCC Should Adopt An Interim Funding Mechanism and Issue a Detailed Notice of Proposed Rulemaking to Allow for Complete Consideration of All the Issues

Given the complexity of the issues involved, the MDPSC agrees with New York that the Commission should adopt a simplified interim high cost funding mechanism at this time.⁷ New York suggests that the Commission quantify the support currently provided by the three universal support sources identified by the Joint Board and allocate this total obligation among interstate providers in proportion to their interstate revenues. Funds would then be disbursed to entities currently receiving support on a frozen per-line basis and eligible carriers competing with the recipients would be eligible for matching per line funding.⁸ The MDPSC agrees that using this interim mechanism will enable the Commission to issue a complete

⁶ Sen. Rep. No. 104-23, 104th Cong., 1st Sess., 25-26 (1995).

⁷ Comments of the New York State Department of Public Service in the Recommended Decision of the Federal-State Joint Board on Universal Service at pg. 13.

⁸ Id.

and specific proposal for public comment without violating the statutory deadline contained in the 1996 Act.

One example of the complex issues involved in creating a high cost fund is the choice of which geographic zones will be utilized to determine high cost support. The initial comments suggest several alternative approaches to the one espoused in the Recommended Decision. For example, under one suggested approach, geographic zones for universal service would match the density zones implemented by the state for unbundled network elements pursuant to the 1996 Act.⁹ The MDPSC notes that the FCC in its NPRM for Access Charge Reform seeks comment on alternative approaches for ensuring that geographic zones generally reflect cost differences and that zones for unbundled network elements, universal service and access charges are compatible.¹⁰ Inconsistent geographic areas may result in arbitrage and may inflate the size of the high cost fund. For these reasons, the MDPSC recommends that the FCC seriously consider requiring that the zones used for universal service be consistent with the zones used for unbundled elements.

Another alternative proposed that not only the zones be determined on a statewide basis but that the FCC use state averaged actual line costs as the basis for high cost support payments.¹¹ In support of this proposal, parties argue that

⁹ See, Nynex Comments on Joint Board Recommendation at pgs. 30-34.

¹⁰ See, In the Matter of Access Charge Reform, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, C.C. Docket 96-262, FCC 96-488 (Dec. 23, 1996) at para. 185.

¹¹ Comments of Bell Atlantic at page 12.

"averaging costs within each state will eliminate the disincentive for efficiency which is built into the existing system because [local exchange carriers] with obsolete technology or inefficient operations will not be rewarded with higher support payments than their more efficient neighbors."¹² The FCC should consider state-wide averaging as an option to minimize the size of the high cost fund.

With regard to the appropriate basis for high cost support payments, the MDPSC recommends that the FCC explore all possible options. Furthermore, the MDPSC agrees with California that the FCC should examine cost models prior to adopting support levels based on them.¹³ The MDPSC further recommends that states should be active participants in the process.

III. The Commission Should Adopt A Cost-Based Benchmark

The MDPSC recommends that the FCC give serious consideration to California's suggestion that the best way to ensure the universal service fund is appropriately directed to high cost areas is to adopt a cost-based benchmark.¹⁴ A cost-based benchmark set above the current level of revenues would be

¹² Comments of Bell Atlantic at page 13.

¹³ Comments of the People of the State of California and the Public Utilities Commission of the State of California on the Recommended Decision at pg. 11.

¹⁴ Id. at pg. 9.

more stable than a revenue based benchmark. By way of illustration, California suggests that only areas which are 150% above the nationwide average cost, as determined by the proxy model chosen by the Commission, should receive high cost assistance.¹⁵ California's recommendation offers the added benefit of being administratively simple to implement. However, a careful analysis is necessary to select the appropriate level of costs which must exceed the nationwide average cost before the area is eligible for funding. Because California's proposal depends on the selection of a proxy model, the MDPSC recommends that the FCC evaluate the use a cost-based benchmark where the benchmark is determined by using the rates for unbundled elements established by the states pursuant to arbitration proceedings. For example, where costs in a geographic zone are 150% above network elements (loop, port, switching, etc.) plus retail costs, carriers serving those areas would be eligible to receive high cost assistance.

IV. The Federal Communications Commission Lacks Jurisdiction Over Intrastate Revenues.

In our initial comments, the MDPSC argued that the Commission lacks the authority to utilize intrastate revenues to fund the federal universal service programs.¹⁶ This conclusion was based upon the continued viability of Section 2(b) of the

¹⁵ Id.

¹⁶ See, Initial Comments of the Maryland Public Service Commission, pgs. 10-18.

Communications Act of 1934 ("1934 Act"), the plain language of the 1996 Act and the legislative history of the 1996 Act. Nothing in the initial comments filed by other parties supports a contrary conclusion. Most commentators who advocated that the Commission has authority to assess intrastate revenues failed to even cite Section 2(b) and studiously avoided any discussion regarding how the FCC could circumvent this prohibition.¹⁷

The Commission cannot lawfully circumvent Section 2(b). Nothing in Section 254 modifies this Section's long-standing limitation on FCC jurisdiction. This jurisdictional separation statute gives the states sole jurisdiction over:

charges, classifications, practices,
services, facilities, or regulations for or
in connection with intrastate communication
service by wire or radio of any carrier.¹⁸

The State of Vermont Department of Libraries,
Department of Public Service, and Public Service Board
("Vermont") argues that there is a significant difference between the collection of funds to finance universal service programs and the rates and conditions of intrastate service.¹⁹ However, this very narrow interpretation of Section 2(b) has been expressly

¹⁷ See, for example, the comments of the following parties: Alaska Public Utilities Commission (pgs. 9-10); United States Telephone Association (pgs. 24-27); GTE (pgs. 77-78); Pacific Telesis Group (pg. 26); AT&T (pgs. 5-8); Time Warner Communications Holdings, Inc. (pgs. 6-9); Competitive Policy Institute (pgs. 7-17); WorldComm. (pgs. 42-44); MFS Communications Company, Inc. (pgs. 49-50); Association of Local Telecommunications Services (pgs. 9-13); and the National Cable Television Association (pgs. 32-36).

¹⁸ 47 U.S.C. §152(b).

¹⁹ See, Vermont Comments at page 5.

rejected. As demonstrated in Louisiana v. FCC, Section 2(b) does not simply forbid the FCC from establishing specific rates for certain intrastate services; it denies the FCC jurisdiction over a broad range of matters associated with intrastate communications and services.²⁰

Vermont also erroneously argues that interpreting Section 254(d) and Section 254(f) to allow the FCC to use both interstate and intrastate revenues would not render meaningless the distinctions created by those subsections.²¹ The plain language of the 1996 Act, as well as its legislative history, demonstrates that this strained interpretation is incorrect.

Section 254(d) provides that "[e]very telecommunications carrier that provides interstate telecommunications service shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable and sufficient mechanisms established by the Commission to preserve and advance universal service." Under the Joint Board's interpretation, virtually all providers of telecommunications services would be required to pay into the interstate fund. All local exchange carriers provide interstate access. Thus, under the Joint Board proposal, their revenues from intrastate services would be used to fund the federal program. If Congress had intended that the intrastate revenues of all carriers be used to fund federal universal service programs, there would be no reason

²⁰ 476 U.S. 355, 373 (1986).

²¹ Vermont Comments at pgs. 2-4.

to use the word "interstate" in identifying those services subject to the federal fund. Congress simply would have directed that "every telecommunications carrier that provides telecommunications services shall contribute" Therefore, Vermont's and the Joint Board's interpretation of the provision would render the entire clause meaningless.²²

The legislative history of the 1996 Act supports an interpretation that is contrary to the one espoused by the Joint Board. Section 254 was based on the Senate bill, with modifications.²³ The corresponding section of the Senate bill stated that:

Every telecommunications carrier engaged in intrastate, interstate, or foreign communication shall participate, on an equitable and nondiscriminatory basis, in the specific and predictable mechanisms established by the Commission and the States to preserve and advance universal service. Such participation shall be in the manner determined by the Commission and the States to be reasonably necessary to preserve and advance universal service. Any other provider of telecommunications may be required to participate in the preservation and advancement of universal service, if the public interest so requires.²⁴

In conference, the specific language in the Senate Bill expanding the scope of contributors did not survive. This section was modified to remove the reference intrastate and

²² This reading violates the fundamental rule of statutory construction that a statute must be read in a manner that assigns meaning to each word and renders no words superfluous. In the Matter of Merchants Grain., 93 F.3d 1347, 1353-1354 (1996).

²³ See, Senate Report No. 230, 104th Cong. 2nd Sess. 130 (1996) ("Joint Explanatory Statement").

²⁴ S. 652, 104th Cong., 1st Sess. Section 253(c)(1995)(emphasis added).

foreign communications, to remove the reference to the States, and to add the term "interstate" to the last sentence.²⁵ The final bill was designed to "preserve the Commission's authority to require all providers of interstate telecommunications" to contribute to the fund set up by the Commission.²⁶ This modification in the final legislation indicates a more narrow reading of the Commission's authority than the Joint Board proposal.

This legislative history also contradicts the unusual argument presented by the Rural Telephone Coalition ("RTC"). In its initial comments, the RTC places great emphasis on the fact that Congress employed the Joint Board process set forth in Section 410(c) of the 1934 Act as the method for defining universal service and designing support mechanisms.²⁷ The RTC contends that "[T]herefore Congress must have at least been willing to alter existing boundaries of federal and state jurisdiction when it chose the mechanism associated with jurisdictional separations to develop a revised universal support system."²⁸ However, as noted above, Congress specifically removed states from the decision-making process for the federal fund. Through their representation on the Joint Board, the

²⁵ The original Senate bill had allowed the Commission and the states to establish a universal service fund that would require "all telecommunications carriers" to contribute to the fund. See, Joint Explanatory Statement, pg. 124.

²⁶ Joint Explanatory Statement, pg. 131 (Emphasis Added).

²⁷ Comments of the Rural Telephone Coalition, pg. 31.

²⁸ Id.

States provide recommendations to the FCC which renders the final decision. This is not a "joint process" as described by the RTC.²⁹

The Commission must not adopt the Joint Board's recommendation concerning the use of combined revenues to fund federal universal service programs. This proposal is in direct contradiction with the words of the universal service provisions of the 1996 Act and with traditional jurisdictional distinctions between interstate and intrastate services. The Joint Board's explanation that, "the statute does not expressly identify the assessment base for the calculation of the contribution,"³⁰ is unpersuasive. A specific provision excepting the statutory division between interstate and intrastate jurisdiction is necessary to justify the collection of contributions that include intrastate revenues. Not only is there no such exception made in the context of universal service, but the language of Section 254 is decidedly to the contrary. Therefore, the Commission must reject the Joint Board's proposal to base contributions on combined revenues.

V. CONCLUSION

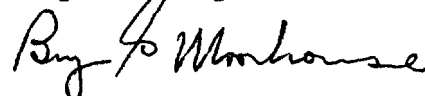
The MDPSC believes that portions of the Joint Board's Recommended Decision provide a good framework for federal universal service policy. For the reasons stated above, and in

²⁹ Id.

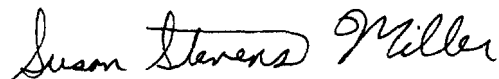
³⁰ In the Matter of Federal-State Joint Board on Universal Service, Recommended Decision (November 8, 1996) at para. 820.

the MDPSC's initial comments, the Commission should make significant modifications to the recommendations of the Joint Board. The MDPSC urges the Commission to avoid expanding the high cost fund beyond its current scope, to direct high cost assistance to high cost areas and to reject the Joint Board's recommendation that intrastate revenues be assessed to fund the federal universal service program.

Respectfully submitted,



Bryan G. Moorhouse
General Counsel




Susan Stevens Miller
Assistant General Counsel

Public Service Commission
of Maryland
6 St. Paul Street, 16th Flr.
Baltimore, Maryland 21202

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 1997,
a copy of the foregoing document was served by mailing, postage
prepaid to the parties on the attached service list.



Susan Stevens Miller
Maryland Public Service Commission
6 St. Paul Street
Baltimore, Maryland 21202
(410) 767-8038

SERVICE LIST CC Docket No. 96-45

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Rm. 814
Washington, D.C. 20554

Ms. Diane Law
Federal Communications Commission
2100 M Street, N.W., Room 8920
Washington, D.C. 20554

The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W., Rm. 814
Washington, D.C. 20554

Mr. Mark Long
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, Florida 32399

The Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W., Rm. 814
Washington, D.C. 20554

Mr. Robert Loube
Federal Communications Commission
2100 M Street, N.W., Room 8914
Washington, D.C. 20554

The Honorable Julia Johnson
Commissioner
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, Florida 32399-0850

Mr. Samuel Loudenslager
Arkansas Public Service Commission
P. O. Box 400
Little Rock, Arkansas 72203-0400

The Honorable Kenneth McClure
Commissioner
Missouri Public Service Commission
301 W. High Street
Suite 530
Jefferson City, Missouri 65101

Ms. Sandra Makeeff
Iowa Utilities Board
Lucas State Office Building
Des Moines, Iowa 50319

The Honorable Sharon L. Nelson
Chairman
Washington Utilities &
Transportation Commission
P. O. Box 47250
Olympia, Washington 98504-7250

Mr. Philip F. McClelland
Pennsylvania Office of
Consumer Advocate
1425 Strawberry Square
Harrisburg, Pennsylvania 17120

The Honorable Laska Schoenfelder
Commissioner
South Dakota Public Util. Comm.
State Capitol
500 E. Capitol Street
Pierre, S. Dakota 57501-5070

Mr. Michael A. McRae
D.C. Office of People's Counsel
1133 15th Street, N.W.
Suite 500
Washington, D.C. 20005

Martha S. Hogerty, Esquire
Public Counsel for the
State of Missouri
P. O. Box 7800
Jefferson City, Missouri 65102

Tejal Mehta
Federal Communications Commission
2100 M Street, N.W., Room 8625
Washington, D.C. 20554

Paul E. Pederson, State Staff Chair
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

Terry Monroe
New York Public Service Commission
Three Empire Plaza
Albany, New York 12223

Ms. Lisa Boehley
Federal Communications Commission
2100 M Street, N.W., Room 8605
Washington, D.C. 20554

Mr. John Morabito
Deputy Division Chief
Accounting and Audits
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, D.C. 20554

Mr. Charles Bolle
S. Dakota Public Util. Commission
State Capitol
500 E. Capitol Street
Pierre, S. Dakota 57501-5070

Mr. Mark Nadel
Federal Communications Commission
2100 M Street, N.W., Room 8916
Washington, D.C. 20554

Ms. Deonne Bruning
Nebraska Public Service Commission
300 The Atrium
1200 N Street
P. O. Box 94927
Lincoln, Nebraska 68509-4927

Mr. John Nakahata
Office of the Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Mr. James Casserly
Federal Communications Commission
Office of Commissioner Ness
1919 M Street, Room 832
Washington, D.C. 20554

Mr. Lee Palagyi
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Dr., S.W.
Olympia, Washington 98504

Mr. John Clark
Federal Communications Commission
2100 M Street, N.W., Room 8619
Washington, D.C. 20554

Ms. Kimberly Parker
Federal Communications Commission
2100 M Street, N.W., Room 8609
Washington, D.C. 20554

Mr. Bryan Clopton
Federal Communications Commission
2100 M Street, N.W., Room 8615
Washington, D.C. 20554

Mr. Barry Payne
Indiana Office of the
Consumer Counsel
100 N. Senate Avenue, Room N501
Indianapolis, Indiana 46204-2208

Ms. Irene Flannery
Federal Communications Commission
2100 M Street, N.W., Room 8922
Washington, D.C. 20554

Ms. Jeanine Poltronieri
Federal Communications Commission
2100 M Street, N.W., Room 8924
Washington, D.C. 20554

Ms. Emily Hoffnar
Federal Communications Commission
2100 M Street, N.W., Room 8623
Washington, D.C. 20554

Mr. James Bradford Ramsay
NARUC Commissioners
P. O. Box 684
Washington, D.C. 20044-0684

Mr. L. Charles Keller
Federal Communications Commission
2100 M Street, N.W., Room 8918
Washington, D.C. 20554

Mr. Brian Roberts
California Public Util. Commission
505 Van Ness Avenue
San Francisco, California 94102

Mr. Daniel Gonzalez
Office of Commissioner Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Mr. Gary Seigel
Federal Communications Commission
2000 L Street, N.W., Room 812
Washington, D.C. 20554

Ms. Lori Kenyon
Alaska Public Utilities Commission
1016 W. Sixth Avenue
Suite 400
Anchorage, Alaska 99501

Mr. Richard Smith
Federal Communications Commission
2100 M Street, N.W., Room 8605
Washington, D.C. 20554

Mr. David Krech
Federal Communications Commission
2025 M Street, N.W., Room 7130
Washington, D.C. 20554

Ms. Pamela Szymczak
Federal Communications Commission
2100 M Street, N.W., Room 8912
Washington, D.C. 20554

Ms. Debra M. Kriete
Pennsylvania Public Util. Commission
P. O. Box 3265
Harrisburg, Pennsylvania 17105-3265

Ms. Lori Wright
Federal Communications Commission
2100 M Street, N.W., Room 8603
Washington, D.. 20554